

# The Commonwealth of Massachusetts State Ethics Commission

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FEB 22 1993

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## THE CONFLICT OF INTEREST LAW and FORMER STATE EMPLOYEES

Massachusetts G.L. c. 268A, the conflict of interest law, continues to apply to state employees, and in some cases their partners, even after the employees leave public service. Section 5 of the law deals with former state employees, and is designed to prevent state employees from making official judgments with an eye toward their personal future interests, or from profiting by their participation in particular decisions or controversies after they leave state service. Furthermore, the law keeps former employees from misusing their past friendships and associations within government to derive an unfair advantage for themselves or others. The law does not prohibit former employees from using expertise gained while employed by the state.

In certain instances the law also prohibits former employees from referring to their partners matters in which they themselves are prohibited from participating.

### Section 5(a) -- Restriction from Participation in Particular Matters

Section 5(a) prohibits former state employees from acting as agent or attorney for, or directly or indirectly receiving compensation from, anyone other than the commonwealth or a state agency in connection with any particular matter<sup>1/</sup> that is of concern to the commonwealth or a state agency and in which they participated<sup>2/</sup> as state employees. Thus, if you actually participated in a particular matter, you can never become involved in that same matter after you leave state service for anyone other than the commonwealth.

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<sup>1/</sup> "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>2/</sup> "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

Whether former state employees are affected by this section is determined by whether they participated, personally and substantially, as state employees in a particular matter such as a recommendation, decision, application or contract. Participation generally means any official action that entails more than ministerial acts such as the signing of an uncontested weekly payroll warrant. Thus, if your current employment involves matters in connection with the past particular matters in which you participated, it is activity perpetually prohibited under this section.

Example: A former state employee who made recommendations on and decisions pertaining to regulations enacted in her state agency is prohibited from working for a private organization on a challenge to the validity of those regulations.

Example: A former employee of the MBTA may not work for an MBTA contractor under the same contract in which he participated as a state employee.

Example: A former state agency attorney is prohibited from representing a private client in new litigation where the parties, facts, and controversy are identical to a lawsuit in which she participated as a state attorney.

#### **Section 5(b) -- One Year Restriction on Appearance Involving Matters over which Former Employees had Official Responsibility**

Section 5(b) focuses on matters over which former state employees exercised authority. Section 5(b) prohibits former state employees, for one year, from personally appearing before any court or state agency as an agent or attorney for anyone other than the commonwealth in connection with a particular matter that concerns the state and where the matter was under their official responsibility<sup>3/</sup> within two years prior to their termination from state service. In other words, this section operates prospectively as a one year ban on former state employees' personal appearances in connection with matters under their authority for the two years prior to their leaving state service.

Under this section, state employees' official responsibilities would include particular matters that they delegated to a subordinate, as well as matters in which they abstained from participation. A personal appearance includes not only the physical appearance of former state employees before their former agencies, but also includes telephone calls or correspondence to their former state agencies made on behalf of any private client.

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<sup>3/</sup>"Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

**Example:** A manager at DEQE assigned a decision to her staff in January, 1987. She left her DEQE position in September, 1988 to take a job with a private firm. She is prohibited through September, 1989 from making phone calls, writing or appearing on behalf of the firm or its clients in connection with the decision, because it was under her official responsibility within two years of her leaving DEQE. This restriction would also apply to other matters under her responsibility from September, 1986 through September, 1988.

#### **Section 5(c) -- Application of Certain Restrictions to the Partners of Former State Employees**

Section 5(c) extends certain prohibitions of §5 to the partners of former state employees. This section prohibits a partner of former state employees, for one year after the termination of the worker's state employment, from knowingly engaging in any activity the former state employees are prohibited from doing under §5(a). In other words, if former state employees are prohibited from engaging in certain activity under §5(a), then their partners are similarly prohibited for one year from engaging in the same activity. This prohibition applies to the partners even where their participation predated the former employees' participation.

The term "partner" for the purposes of §5 has been defined by the Commission to include a member of a group of lawyers who by their conduct give the appearance of being partners. The term "partner" is not restricted to those who enter into formal partnership agreements; it may also apply to individuals who join formally or informally in a common business venture. In determining whether a partnership arrangement exists, the Commission looks to the substance of the individuals' relationship rather than the term used to describe that arrangement.

**Example:** A former DPU attorney joins a private law firm as a partner. The law firm partners may not, for one year, represent any private clients in connection with a lawsuit which the former DPU attorney litigated as a state employee.

#### **Section 5(e) -- Former State Employees are Restricted from Acting as Legislative Agents.**

Section 5(e) prohibits former state employees for one year after leaving state service from acting as a legislative agent for anyone other than the commonwealth before their former state agencies. A "legislative agent" is defined in G.L. c. 3, §39 as anyone who for compensation or reward does any act to promote, oppose or influence legislation or the adoption, defeat or postponement of a standard, rate, rule or regulation.

The Commission stated in ***The Matter of Neil Foley***, 1984 SEC 172, that, "The need to insulate the legislative process from the former employee's inevitable special knowledge and access during this initial period is the same whether the former employee is doing the lobbying directly or instead is advising and directing the lobbying activities of someone else."

Example: A former state employee who left his position on a legislative committee for employment with a private organization is prohibited for one year under §5(e) from communicating information on legislation to and from his organization and its principal legislative agent. He is likewise prohibited from soliciting and assisting the lobbying activities of others by participating in drafting letters to legislators, or by advising other parties on how they could be most helpful in supporting his organization's position on legislation.

### Section 23 -- Former State Employees Prohibited from Disclosing Confidential Information

Section 23(c) prohibits former state employees from: (1) accepting employment or engaging in professional activity that will require them to disclose confidential information of which they learned in their state jobs; and (2) improperly disclosing such non-public information to further their personal interests. Confidential or non-public information is material or data which is exempted from the definition of a public record under G.L. c. 4, §7.

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### Conclusion

This summary is intended to provide you with guidance in your activities after you leave state employment. It is not intended to cover every situation. If you have specific questions concerning your activities under these provisions, please call the State Ethics Commission's Legal Division at (617) 727-0060.

ISSUED: January 20, 1989